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Nos. 88-854, 88-856, 88-870

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, et al.,

Petitioners,

—v.—

UNITED STATES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF SAVE YONKERS FEDERATION, INC. IN SUPPORT OF PETITIONERS

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The *Amicus Curiae*

Save Yonkers Federation, Inc. ("SYF"), a not-for-profit corporation chartered under the laws of the State of New York, is an "umbrella" organization representing some forty civic, neighborhood and taxpayer groups in connection with all housing and related issues in the City of Yonkers.

Following the district court's finding that low-income public housing in the Southwest quadrant of the City of Yonkers had been racially segregated, and the court's remedial order requiring that 1,000 units of scattered site low- and "middle"-income

public housing be created outside of the Southwest, SYF (on behalf of its constituent organizations and their individual members) actively campaigned not against Judge Sand's liability finding, but against his remedy.

SYF's opposition included the filing of a Petition for a Writ of Prohibition in the United States Court of Appeals for the Second Circuit which contended that the district court's housing remedy order exceeded his statutory and general equitable powers, and that it violated the constitutional rights of Yonkers residents.[1]

SYF's opposition to the district court's housing remedy—which, instead of desegregating low-income public housing in Southwest Yonkers, seeks to integrate the rest of Yonkers with 1,000 scattered site units of low- and "middle"-income housing—continues with this brief *amicus curiae* supporting the Yonkers City Councilmen who were forced to enact remedy-implementing legislation under threat of personal fines and imprisonment.

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1 The Petition for a Writ of Prohibition was denied, as were requests for rehearing and en banc consideration. A Petition for a Writ of Certiorari will be filed in this court by mid-May 1989.

ARGUMENT

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the [Yonkers City] Council members who fails to vote in favor of enactment of such legislation . . . shall be personally fined $500 per day . . . .

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988 any [Yonkers City] Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United States Marshall for imprisonment . . . .

Leonard B. Sand
United States District Judge[2]

* * *

That is what this suit is about. Power.

Antonin Scalia
Associate Justice,
Supreme Court of the United States[3]

Introduction

The facts of this case are set forth at length in the various submissions of the parties, and thus they will not be repeated here except as may be necessary to the discussion *infra*.

Basically, the broad contours of what happened below are not disputed.

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2 Judge Sand's order of July 26, 1988 is Exhibit "A" (pages 1a-5a) to Petitioner Peter Chema's "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit" in case No. 88-856. That Appendix will be cited *infra* as "CA."

3 Scalia, J., dissenting in *Morrison* v. *Olson*, _____ U.S. _____, 108 S.Ct. 2597, 2623 (1988).

After a lengthy bench trial the District Court held that the City of Yonkers had racially discriminated in its placement of low-income public housing in the City's Southwest quadrant. Instead of desegregating the Southwest, Judge Sand ordered that housing in the rest of Yonkers be integrated by the creation of 1,000 scattered site units of low- and "middle"-income public housing. After the Second Circuit affirmed as to both liability and remedy, the City entered into a consent decree.[4] (In a related case, the Second Circuit acknowledged that the City's "consent" had been coerced: *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 865 (2 Cir. 1988)).

It turned out that in order to implement the consent decree the district court believed that the enactment of certain legislation was needed in Yonkers (e.g., changes in the zoning law). A majority of the seven-member City Council balked, and the district court began to escalate threats and penalties. In sum, the district court made it clear that unless the individual City Councilmen voted in the Yonkers City Council for the consent decree-implementing legislation, they would be fined and imprisoned—a level of coercion which Judge Sand himself characterized as "extraordinary": "I know," he admitted, "of no parallel for a court to say to [an] elected official, 'you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.' I find that extraordinary."[5] Extraordinary or not, eventually fines were levied and, with one foot figuratively inside the Metropolitan Correctional Center, two of the four recalcitrant City Councilmen (Longo and Fagan) capitulated.[6] The consent decree-implementing legislation was enacted.

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4 Even though the consent decree purported to bar further proceedings, the City filed a Petition for a Writ of Certiorari. It was denied (108 S.Ct. 2821, June 13, 1988).

5 CA 29c.

6 Petitioners Chema and Spallone continued to vote against the consent decree-implementing legislation and the final Council vote was 5-2.

The Councilmen's Petitions for Certiorari were granted and their case is now before this Court. Understandably, Petitioners' focus in this Court appears to be on their immunity, *qua* municipal legislators, from contempt sanctions related to performance of their official duties.

However, the *amicus curiae* sees the matter differently, and believes that Petitioners have misconceived the real issue here.[7] As the *amicus curiae* will explain *infra*, implicit in, and at the core of, the immunity issue is the more fundamental question of the scope of the district court's contempt power vis-à-vis the legislative processes of a municipality. In other words, the *amicus curiae* focuses on the "cause" (i.e., the scope of the district court's power), not on the "effect" (i.e., the impact on the Councilmen).

Thus, although the *amicus curiae* supports the Councilmen's conclusion in this Court that they were immune from the district court's threats and contempt sanctions, we reach that conclusion by another route. We do not get there via the *holdings* of *Lake Country*, *supra*, and the other 42 U.S.C. § 1983 cases cited therein, because, among other reasons, this is not a 1983 case seeking civil damages but rather a contempt case where the prime actor is not a private plaintiff but a federal district judge. Instead, the *amicus curiae* reaches the conclusion that the Councilmen were immune because of the basic *principle* of legislative freedom underlying *Lake Country* and the cases cited therein, a principle which acts as a check on the contempt power of a federal district court, defining its power. As this court said in a related context nearly three decades ago: "In this situation the burden is on this Court to define the limitations upon the contempt power according to the terms of the Federal Constitution." (*Wood* v. *Georgia*, 370 U.S. 375 (1962)).

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7 The Court, of course, possesses the power to address any issue "fairly comprised within the questions presented by the Petition for Certiorari. . . . (*Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

Question Presented

In light of Federalism and Separation of Powers principles, does the contempt power of a federal district judge extend to forcing elected municipal legislators, *qua* individuals, to pass laws in aid of implementing a remedy for constitutional violations?

Disclaimers

At the outset, in addition to its observation *supra*, concerning the proper focus for this Court in consideration of this case, the *amicus curiae* wishes to state what its argument here does *not* embrace.

First, we do not differentiate (as Justice Marshall did in his dissent from the grant of a stay [CA 10h-12h]) between a District Court's use of coercion/contempt to enforce such a "consent" decree as is found in this case, a more freely arrived-at consent decree, or a non-consent order or judgment. As we view the issue, the basic question is one of Federalism and/or Separation of Powers as a limitation on the scope of a district court's contempt power. *What* that power seeks to enforce or implement is irrelevant.

Second, unlike Petitioner Chema, the *amicus curiae* eschews the incremental argument that the district court's use of coercion-contempt to get municipal legislation enacted was "wrong" because "there exist[ed] less intrusive means for the district court to achieve its worthy goals" and because the force was used "as a first, rather than a last resort."[8] The *amicus curiae* argues that a federal district court lacks the power to do what was done here, no matter what other means did or did not exist, and that such power is absent first, last and always.

Third, the *amicus curiae* views as irrelevant for present purposes that the "wrong" in this case was of constitutional dimension, and that the "remedy" itself may have exceeded the district court's statutory and/or equitable powers.[9] The *amicus*

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8 Petitioner Chema's Petition for a Writ of Certiorari, p. 8.

9 As to the remedy, as stated in footnote 1 above, SYF will presently file in this Court a Petition for a Writ of Certiorari.

curiae argues that no matter what the wrong or the remedy, a district court lacks the power to force elected municipal legislators to enact implementing laws.

Fourth, the *amicus curiae* does not, for present purposes, challenge the existence of a majority view on this Court that there exists "inherent judicial power to punish those violating court judgments with contempt. . . ."[10] Even if that is true, it too is irrelevant here because the mere existence of such power neither defines its scope nor allows it to overcome root principles of Federalism and Separation of Powers. Indeed, this Court recognizes that the contempt power has limitations.[11]

Fifth, the *amicus curiae* does not argue that any of the Petitioners should have been free of the district court's contempt power because the terms of the consent decree that two of them (and three other Council members) voted for were altered in the municipal ordinances that the court wanted enacted. For one thing, it is arguable whether or how much the consent decree was changed. For another, and more important, as we have said above, the basic question is the scope of the district court's contempt power, not what it was seeking to implement.

Sixth, unlike Petitioner Spallone, the *amicus curiae* does not agree that there existed an "obligation of the City of Yonkers to comply with the consent decree. . . ."[12] On the contrary, a principal reason that the *amicus curiae* has submitted this brief is because of its belief that a single principle unifies the district court's coercion of Petitioners to obtain the "consent" decree and his coercion of them to obtain the municipal legislation in aid of implementing that decree and his follow-up housing remedy order. As more fully discussed *infra*, that principle is that Federalism and Separation of Powers bar a district court from using the contempt sanction to achieve the enactment of legislation, *for any reason*.

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10 Scalia, J., concurring in *Young* v. *U.S.*, ____ U.S. ____, 107 S.Ct. 2124 (1987).

11 *Shillitani* v. *U.S.*, 384 U.S. 364 (1966).

12 Petitioner Spallone's Petition for a Writ of Certiorari, p. 14.

Discussion

Much has already been said above, albeit of a conclusory nature, to the effect that Federalism and Separation of Powers prohibit the contempt power of a federal district court from being used to force elected municipal legislators, *qua* individuals, to enact laws in aid of implementing a remedy for constitutional violations.

Although the *amicus curiae* agrees with Justice Scalia's general observation in *Young*, *supra*, that "[e]xcept, however, for a line of cases beginning in 1895 with *In Re Debs* . . . whose holding and rationale we have since repudiated, no holding of this Court has ever found inherent judicial power to punish those violating court judgments with contempt . . . .",[13] there are other reasons as well why the legitimate scope of the district court's contempt power fell far short of where Judge Sand pushed it.

To begin with, the District Court was correct when he himself characterized as "extraordinary" his use of contempt power to force individual Yonkers City councilmen to enact specified legislation. Judge Sand wrote on a clean slate, and his inability to adduce either precedent or even policy to support his freewheeling use of federal judicial power is not surprising. Even accepting the language of 18 U.S.C. § 401(3) (which does not apply in this case), there is no statutory authority anywhere, let alone in the Fair Housing Act, which even impliedly authorizes a Federal judge to order individual legislators to enact laws. Nor has this Court ever found such authority to be "inherent."[14] Indeed, in his dissent from the grant of a stay in this case Justice Marshall acknowledged that even *Milliken* v. *Bradley*, 433 U.S. 267 (1977) and *Griffin* v. *County School Board*, 377 U.S. 218 (1964) do not so hold.[15] Moreover, since in the same place[16] Justice Marshall concedes that the immunity question which the

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13 *Young*, *supra*, at _____ U.S. _____, 107 S.Ct. 2143.

14 See Justice Scalia's observations in *Young*, *supra*.

15 CA 11h.

16 CA 11h.

Councilmen have raised is an open one, it follows that the question of the scope of the district court's contempt power articulated by the *amicus curiae* here must be equally open, for the Councilmen could not be immune from the contempt power asserted by Judge Sand, at the same time that power continued to exist.

In addition, it should be noted that in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695 (1979) Justice Stevens observed categorically, in a statement not challenged by the three justices who dissented in part, that "[w]hether [the State Department of] Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful."[17]

Doubtful indeed! The policy reasons, rooted in the principles of Federalism and Separation of Powers have consistently and often been enunciated by this Court.

In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943) and *Walton* v. *House of Representatives*, 265 U.S. 487 (1924) this Court stayed the hand of equity which might otherwise have interfered with the state governmental operations generally.

More specifically, this Court addressed "legislative freedom" eloquently and at length in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951):

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long bitter struggle, Parliament finally laid the

17 See also *U.S.* v. *Board of School Commissioners*, 368 F. Supp. 1191, 1227 (S.D. Ind.), aff'd 483 F.2d 1406 (7th Cir. 1975), cert. den. 421 U.S. 929 (1975), where the District Court acknowledged that it lacked the power to order a state legislature to pass laws.

ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St.Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' 1 Wm. & Mary, Sess. 2, c. II. See Stockdale v. Hansard, 9 Ad. & El. 1, 113-114 (1839).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: 'Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress * * *.' Article I, s 6, of the Constitution provides: '* * * for any Speech or Debate in either House, (the Senators and Representatives) shall not be questioned in any other Place.'

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.' II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: 'That freedom of speech, and debates or proceedings in the Legislature, ought not to be impeached in any other court or judicature.' Art. VIII. The Massachusetts Constitution of 1780 provided 'The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court of place whatsoever.' Part I, Art. XXI. Chief Justice Parsons gave the following gloss to this provision in Coffin v. Coffin, 1808, 4 Mass. 1, 27:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.

• • •

> It is significant that legislative freedom was so carefully protected by the constitutional framers at a time when even Jefferson expressed fear of legislative excess. [Footnote omitted]. For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. 'The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.' Madison, The Federalist, No. XLVIII.
>
> As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege. [Footnote omitted]
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> • • •
>
> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in State of Arizona v. State of California, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154.

Consistent with the principles expressed in *Tenny* by Justice Frankfurter was Justice Black's prescient dissent from the denial of Certiorari in *Lance* v. *Plummer*, 384 U.S. 929 (1966):

> The significance of this case . . . is the manner in which the courts below exercised the power to punish for con-

tempt. . . . The question of the punishment here is even more important because it is imposed not after a full trial with all the constitutional Bill of Rights' guarantees but after a summary contempt proceeding in which a single judge lays down the law, prosecutes those whom he believes disobey it, passes judgment on the alleged violations, and finally imposes punishment as he sees fit. See Green v. United States, 356 U.S. 165, 198, 78 S.Ct. 632, 650-651, 2 L.Ed.2d 672 (dissenting opinion).

By ordering this state officer to surrender his badge and resign from his state office, the District Judge below assumed for the federal judiciary a new, unprecedented, and, I believe, highly dangerous power. To give federal judges such authority seems not only completely out of place in our federal form of government but it at least comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. Subjecting a state official's tenure of office to the discretion of the federal judiciary makes state officers responsible not to the people of the State but instead to federal judges who, according to the holding here, may oust them from their state office without even so much as a simple notice to the State whose officers they are. I cannot help but believe that the legislators who passed the 1964 Civil Rights Act will be greatly surprised if not shocked to learn that by passage of that law they empowered federal judges to remove state officers without even giving these impeached officers a trial by jury. * * * No reason is given by the courts below for not respecting the authority of a State to conduct its governmental operations by agents responsible to the people of the State. There is no suggestion that the traditional remedies for contempt are inadequate in this case. And no one claims that this new federal judge power to remove state officers is necessary to enforce the salutary provisions of the 1964 Civil Rights Act. It is clear that the judge's order here provides complete protection to the plaintiff's rights

without that part compelling the State's deputy sheriff to hold his job at the pleasure of the United States judges.

I regret that the Court refuses to review this case in order to make it clear to all the people just how far this new contempt power of federal judges goes. Here it is only an appointed deputy sheriff that is removed from office, but if this new contempt enforcement power is legal I can think of no reason why it cannot be used against more important state officials whether elected or appointed. If federal judges can remove sheriffs why not members of the state legislatures, state judges, and why not even state governors. In considering the importance of this power to remove state officers, it is highly relevant that this new power jeopardizes not merely officers in a few States, but threatens every state officer in every State from Florida to Alaska, from Maine to California and Hawaii. In order to protect the rights of citizens to vote in state elections this Court recently announced the constitutional principle of 'one person, one vote.' It seems a little early to graft onto that principle a new one giving United States judges the power to remove state officials chosen by the people in strict accordance with the 'one person, one vote' principle.

Mr. Justice HARLAN: This is one of those rare instances in which I feel justified in noting my dissent to the action of the Court on a petition for certiorari, not involving an adjudication on the merits. I fully share my Brother BLACK'S view that the issues in this case are important and that certiorari should be granted.

The *Tenney* principle of legislative freedom, rooted in the principals of federalism and separation of powers canvassed by Justice Black in *Lance*, formed the basis of this court's immunity ruling in *Lake County Estates*, *supra*, and later in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980).

The latter case is extremely germane to the question presented here. Justice White's opinion for the unanimous court in *Consumers Union* (Justice Powell did not participate) not only

noted that in *Tenney* "[w]e have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause" (446 U.S. at 732), but it went further.[18]

The court observed that

> . . . there is little doubt that if the Virginia legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, *or members* for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity. (446 U.S. at 733-4, emphasis added).

In other words, if a "wrong" existed (invalidity of the Code), legislators refusal to "remedy" (amend) it would be unreachable by civil process. If that is what this Court unanimously meant in *Consumers Union*, then the United States District Judge's use of his contempt power to force the Councilmen to enact legislation violated both Federalism and Separation of Powers. Federalism, because the Tenth Amendment reserves to the state all legislative power not delegated or prohibited, and thus the federal government lacks the constitutional authority to force the enactment of legislation by the states. Separation of powers because, with all respect to this Court, judges lack the textual, constitutional power to legislate.

At the risk of presuming, the *amicus curiae* cannot help but wonder what would be the reaction of those who so carefully

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18 Since New York has a Speech or Debate Clause (Const., Art. III, § 11), to the extent that municipal councilmen enjoy derivative protection it can be said that Judge Sand's use of contempt violated petitioner's State Speech or Debate Clause Rights and thus also violated the principle of federalism. There are two "interrelated rationales", *U.S. v. Gillock*, 445 U.S. 360, 369 (1980), of the Speech and Debate Clause—445 U.S. 360, 369 (1980) avoiding judicial intrusion into the legislative branch, and protecting legislative independence—and both would seem to apply here.

erected the three pillars of American Constitutionalism—Federalism, Separation of Powers, and Judicial Review—were they to learn that under threat of fines and imprisonment a federal district judge forced elected municipal legislators to pass a law.

Conclusion

For the foregoing reasons the District Court lacked the power to force the legislation's enactment.

/s/ HENRY MARK HOLZER
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